MAJLIS AGAMA ISLAM NEGERI PULAU PINANG A

v.

WAKIL DIRI KEPADA HARTA PESAKA ALI HUSSAIN, SI MATI & ANOR

B

HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CIVIL SUIT NO: 22-566-2007]
14 OCTOBER 2011

C

SUCCESSION: *Administration - Administration action - Claim by Islamic Religious Council to 'Baitulmal' share in land - Failure by council to prove land belonged to deceased Muslim - Failure by council to prove contents of Sijil Faraid to show entitlement to Baitulmal share therein - Whether bona fide purchaser of land from third party for value without notice acquired indefeasible title - National Land Code 1965, ss. 4(2)(e), 340(1) & (3)* D

EVIDENCE: *Documentary evidence - Failure to prove document signed by deponents or that they had personal knowledge of matters deposed - Failure to show document produced from proper custody and free of suspicion - Whether court unable to presume signatures on document belonged to deponents and that they were duly attested - Whether correctness and truth of document could be presumed - Whether document admissible - Evidence Act 1950, ss. 73A & 90* E

The plaintiff in the instant suit sought, *inter alia*, to declare that the transfer of a piece of land to the second defendant as invalid and for the plaintiff to be declared the beneficial owner of a 39/48 Baitulmal share ('the Baitulmal share') in the land and that share be ordered to be registered in its name. The plaintiff contended that the land belonged to the estate of a deceased Muslim named Tam @ Tan binti Mat Assan ('Tam') and that the Baitulmal share was vested in the plaintiff under the Administration of the Religion of Islam (State of Penang) Enactment 2004. The plaintiff averred that the second defendant's contention that he had bought the land for RM60,000 from a third party was not tenable because the transferor's thumbprint on the land transfer document was attested by a lawyer five months after the transferor had died. In denying the plaintiff's claim, the second defendant argued that there was no proof that the original owner of the land, Tam, was a Muslim or that Tam and Tan binti Mat Assan were the same person or that Tam @ Tan binti Mat Assan was the registered owner of the land. The second defendant said that he was a *bona fide* purchaser of the land for value without notice and that he had acquired indefeasible title to the land. The plaintiff withdrew its case against the first defendant. F G H I

Held (dismissing claim with costs):

(1) The plaintiff failed to prove that an estate of Tam @ Tan binti Mat Assan existed to give rise to a Sijil Faraid by virtue of which a 39/48 Baitulmal share in the land vested with the plaintiff. The land in question was registered only in the single name of Tam. A half-share in an adjoining land was registered in the name of Tan binti Mat Assan. No proof was shown that Tam had any nexus with Tan binti Mat Assan or with one 'Etam bt Mat Assan' nor was there any proof that Tam and Tan binti Mat Assan were one and the same person. (paras 22 & 23)

(2) There was no evidence to prove that Tam was a Muslim. The statutory declaration ('ID 17') which the plaintiff sought to admit into evidence to show that Tam had a nexus with Tan binti Mat Assan only referred to the death and burial of one 'Etam bt Mat Assan'. It did not refer to Tam or to Tan binti Mat Assan nor did it say that 'Etam bt Mat Assan' was known as Tam and/or Tan binti Mat Assan. Even if it was admitted as an exhibit, ID 17 did not show any nexus nor prove that Tam and Tan binti Mat Assan were the same person. (paras 16 & 21)

(3) The plaintiff failed to prove the contents of the Sijil Faraid which were challenged by the second defendant. The plaintiff could have easily called the relevant authority to prove how the 39/48 Baitulmal share in the land came about upon the death of Tam assuming Tam was a Muslim and left no male descendant. The plaintiff failed to do the minimum to satisfy its burden of proof. (para 24)

(4) As a *bona fide* purchaser of the land for value without notice, the second defendant's title to the land was indefeasible under s. 340(1) of the National Land Code 1965 ('NLC') and the plaintiff had no cause of action against him. As the plaintiff failed to prove that an estate of Tam @ Tan binti Mat Assan existed and that a Baitulmal share in that estate vested in the plaintiff, s. 4(2)(e) of the NLC could not be invoked to override the provisions of s. 340(1) and (3). (para 25)

(5) ID 17 was not admissible under s. 73A of the Evidence Act 1950 as it had not been proved that the declarants of that document had in fact signed the declaration, nor was the pre-condition in s. 73A(1)(a)(i) proved that they had personal knowledge of the matter dealt with by the declaration. The court could not presume

that the signatures on ID 17 were those of the declarants. Neither could the court presume, under s. 90 of the Evidence Act 1950, that the signatures were the declarants' handwriting and that they were duty attested as it was not shown that ID 17 was produced from proper custody and was free of suspicion. (paras 17, 18 & 19)

Case(s) referred to:

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Commissioners of the Municipality of Malacca v. Sinniah [1970] 1 LNS 22 HC ***(refd)***

G Rethinasamy lwn. Majlis Ugama Islam, Pulau Pinang & Satu Lagi [1993] 2 CLJ 605 HC ***(refd)***

Loo Keck Leong v. PP [1992] 3 CLJ 1332; [1992] 1 CLJ (Rep) 195 SC ***(refd)***

Pang Cheng Lim v. Bong Kim Teck & Ors [1997] 4 CLJ 414 FC ***(refd)***

PP v. Datuk Haji Harun Haji Idris & Ors [1977] 1 LNS 92 HC ***(refd)***

Re Dato Bentara Luar, decd Haji Yahya Yusof & Anor v. Hassan Bin Othman & Anor [1982] 1 LNS 16 FC ***(refd)***

Sharma Kumari Oam Parkash v. PP [2000] 1 LNS 123 HC ***(refd)***

Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors [2005] 3 CLJ 539 CA ***(refd)***

Tenaga Nasional Berhad (Formerly Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (Formerly Perwaja Terengganu Sdn Bhd) [1995] 4 CLJ 670 HC ***(refd)***

Yee Ah Fern v. Alliance Bank Malaysia Bhd [2010] 5 CLJ 475 HC ***(foll)***

Legislation referred to:

Administration of Muslim Law Enactment 1959, ss. 4, 88(1), (3), 89(1), 172(2)

Administration of the Religion of Islam (State of Penang) Enactment 2004, s. 81

Evidence Act 1950, ss. 73A(1)(a)(i), (2)(a), (3), 74(a)(ii), 90, 101, 102, 103, 114(e)

National Land Code, ss. 4(2)(e), 340(1), (3)

Other source(s) referred to:

Sarkar's *Law of Evidence,* 15th edn, 1999, p 1678

For the plaintiff - Mohamed Aslam Mohamed Mydin; M/s Presgrave & Mathews
For the 1st defendant - Benjamin Khor; M/s Khor Ong & Co
For the 2nd defendant - Thayalan Muniandy; Thayalan & Assocs

Reported by Ashok Kumar

A

JUDGMENT

Chew Soo Ho JC:

Brief Facts

B **[1]** The plaintiff's claim against both the defendants is premised on a Sijil Faraid dated 5 May 1995 for 39/48 of Baitulmal share of the land known as Lot No. 563, GM 703 Mukim 16, Seberang Perai Utara, Penang ('the said land') which was allegedly the estate of "Tam @ Tan binti Mat Assan", deceased. However, on 24 August 2011, the plaintiff
C withdrew the case against the first defendant, ie, the estate of Ali bin Hussain, deceased with liberty to file afresh. Pursuant to s. 81 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 ('the Enactment 2004') (previously Enactment 1959) under which the plaintiff was incepted, the share of Baitulmal in the said land in the alleged estate of "Tam @ Tan binti Mat Assan" was vested in the
D plaintiff. *Vide* a small estate distribution order dated 13 October 1995 which was applied by one Maimunah bt Ahmad, the plaintiff was to administer the estate of "Tam @ Tan binti Mat Assan".

[2] By an order of the High Court Penang dated 23 May 1996 given
E in Originating Summons No. 24-857-1995, it was ordered that the said land which had been purchased by one Ali bin Hussain shall be registered in his name and on 2 August 1996, the said land was transferred and registered in the name of Ali bin Hussain. Subsequently Ali bin Hussain sold the said land to Ang Chun Bock who sold to Tan
F Hai Seang and ultimately to the second defendant for a consideration of RM60,000 and it was duly transferred and registered in the second defendant's name on 25 November 1996, second defendant remains the registered owner till today.

[3] The plaintiff pleaded that the transfer of the said land from Ali
G bin Hussain to the second defendant was void as the said Ali had passed away on 11 March 1996 while his thumb print on the Form 14A memorandum of transfer was allegedly attested on 26 August 1996 by a lawyer named N Nakaretnam.

H **[4]** Hence the plaintiff prayed for, *inter alia*, a declaration that the transfer of the said land is invalid and to be set aside, that the plaintiff is the beneficial owner of 39/48 shares of Baitulmal over the said land, that this 39/48 shares of the said land be transferred and registered in the name of the plaintiff, damages, interest and costs.

I

[5] The second defendant denied the plaintiff's claim and put the plaintiff to strict proof contending particularly that "Tam" was not proved to be a Muslim and that there was no proof that "Tam" and "Tan binti Mat Assan" were the one and same person nor that "Tam @ Tan binti Mat Assan" was the registered owner of the said land. The second defendant averred that he is a *bona fide* purchaser for valuable consideration of RM60,000 without notice. It was further contended *inter alia* that since the Baitulmal share is derived from a person who died in 1940, there is no right accrued to the plaintiff who was not created or in existence at the material time.

The Issues

[6] A number of issues had been raised by both parties as listed out in bundle F and bundle G. From the facts and evidence of the case as a whole, I find the following issues deduced therefrom are to be determined by this court in the final disposal of this case:

(a) Whether the plaintiff was vested with the right to property in the year 1940 when plaintiff contended that the deceased "Tam", assuming "Tam" was a Muslim, had died in 1940;

(b) Whether the plaintiff had proved that "Tam" was a Muslim and "Tam" and "Tan binti Mat Assan" were the one and same person to constitute the estate of "Tam @ Tan binti Mat Assan" from which the plaintiff acquired its right over the Baitulmal shares;

(c) Whether the plaintiff had proved their entitlement of 39/48 shares of the said land *vide* the Sijil Faraid; and

(d) Whether the second defendant was a *bona fide* purchaser for value without notice.

Evaluation And Findings

[7] Since the plaintiff's claim pertains to land allegedly to be 39/48 shares of the said land towards Baitulmal, it is worth to note that if that portion of the said land is Baitulmal land, it will fall under s. 4(2)(e) of the National Land Code 1965 (NLC) which precedes and excludes the applicability of the provisions of NLC including the issues of indefeasibility of title under s. 340 of the NLC. It is clear law therefore that when a land is proved to be Baitulmal land, the registered proprietor of the land cannot rely on the indefeasibility of title under s. 340(1) NLC as a defence to such claim nor can he claim that he is a *bona fide* purchaser for valuable consideration under s. 340(3) NLC 1965; see *G Rethinasamy lwn. Majlis Ugama Islam, Pulau Pinang & Satu Lagi* [1993] 2 CLJ 605; [1993] 2 MLJ 166.

A **First Issue - The Vesting Of Right On The Plaintiff In 1940**

[8] Second defendant contended that the existence of plaintiff came about only in 1959 *vide* s. 4 of the Administration of Muslim Law Enactment 1959 which was subsequently replaced by the Penang Administration of the Affairs of Islamic Religion Enactment 1993 and by the current 2004 Enactment. Based on the allegation in exh. P16, the record of small estate distribution, content of which was not admitted by the defence, assuming Tam was a Muslim, he/she had allegedly died in year 1940. Since no law had existed in 1940 to provide for Baitulmal to be vested in anyone or any body, it was contended by the defence that the entire estate became crown property and the said land became crown land. It could not thus be vested in the plaintiff since s. 89(1) of the 1959 Enactment did not provide with retrospective effect but that Baitulmal would only vest in the plaintiff when a Muslim died after the commencement of the 1959 Enactment.

[9] The plaintiff submitted that the provision of s. 89(1) of the 1959 Enactment should be read together with s. 88(1) of the same Enactment which provides that a general endowment fund shall be set up from all moneys and property, movable or immovable, which by Muslim law or under the provisions of the Enactment (1959 Enactment) or rules made thereunder accrues or is contributed by any person or payable to the fund. It was submitted the Islam divine law which is immutable (*Re Dato Bentara Luar, decd Haji Yahya Bin Yusof & Anor v. Hassan Bin Othman & Anor* [1982] 1 LNS 16; [1982] 2 MLJ 264, 271 SC) had existed without change in form or quality or nature at all time which in this respect pertains to money or property that were payable to Baitulmal and it is wrong to contend that the estate of a deceased Muslim without beneficiary can be inherited or vested in the crown under the English common law.

[10] Section 89(1) of the 1959 Enactment provides:

> 89(1) where, after the commencement of this Enactment, any Muslim dies in such circumstances that, under the provisions of Muslim law, his property would vest in, or become payable to, the Baitulmal, the property of such person, in pursuance of such provisions shall vest in and become payable to the Majlis and form part of the General Endowment Fund.

[11] The General Endowment Fund referred to in s. 89(1) above is established pursuant to s. 88(1) of the 1959 Enactment which provides:

> 88(1) A fund to be known as General Endowment Fund is hereby established. Except as otherwise provided under the provision of this Enactment such fund shall consist of all money and property, movable

or immovable, which by Muslim law or under the provisions of this Enactment or rules made hereunder accrues or is contributed by any person or payable to the Fund. A

[12] Section 88(3) of the 1959 Enactment provides:

88(3) All money and property in the General Endowment Fund shall be vested in the Majlis who shall administer all such money and property in accordance with the rules made under this Enactment: B

…

[13] It is a fact that plaintiff was created pursuant to the 1959 Enactment and undoubtedly did not exist in 1940 when the said "Tam" was alleged to have died in that year. It is also a fact that there is no evidence whether "Tam" had any children or beneficiaries. Assuming that "Tam" was a Muslim, the Muslim law would be the applicable law in the administration of her estate. This can be seen from the old Mohammedans Ordinance No. 5 of 1880 where, as it was still effective before being repealed, s. 27 therein as was contained in Chapter 57 introduced by Revised Laws of the Straits Settlements 1936 provides that: C D

27. In the case of any Mohammedan person dying intestate after the 1st January, 1924, the estate and effects shall be administered according to Mohammedan law, except in so far as such law is opposed to any local custom which prior to 1st January, 1924, had the force of law Provided that any of the next of kin who is not a Mohammedan shall be entitled to share in the distribution as though he were a Mohammedan. E F

[14] The Mohammedan law or Muslim law had been incorporated in the old Ordinance and made applicable to the administration estate of a deceased Muslim as early as 1 January 1924 in the Straits Settlements. In 1959 when the Administration of Muslim Law Enactment 1959 was introduced the Muslims Ordinance (Mohammedans Ordinance) was repealed by s. 172(2) 1959 Enactment except Parts I and III where s. 27 was. It is clear therefore that in 1940, the Mohammedan divine law pertaining to the estate of a Muslim deceased incorporated in the Muslims Ordinance 1880 was applicable to the estate of 'Tam' if he/she was a Muslim. As Baitulmal is part and parcel of the Mohammedan law in the estate distribution of a deceased Muslim, it would have so existed in 1940 in respect of the estate of "Tam". Consequently, it is unsustainable to contend that the land being the estate of "Tam" would be crown land *bona vacantia vide* the English common law in the light of the applicable law in 1940. G H I

[15] The primary contention of the second defendant is basically that the plaintiff did not exist in 1940 and hence had no jurisdiction to administer the estate of "Tam" who died in 1940 because s. 89(1) of the 1959 Enactment did not carry with it a retrospective effect. I find that a pragmatic reading of s. 89(1) does not support the contention of the second defendant. The phrase "after the commencement of this Enactment" does not connote that this provision is only applicable or restricted to any Muslim who dies after the commencement of this Enactment but rather that his property or the Baitulmal share of the property shall vest in the Majlis and form part of the General Endowment Fund after the commencement of this Enactment. I say so because from the wording of "any Muslim dies in such circumstances that, under the provisions of Muslim law, his property would vest in, or become payable to the Baitulmal", it can be construed that so long as the Muslim law is applicable to a Muslim who dies and his property would vest in or payable to Baitulmal, the Majlis would take over those Baitulmal property as part of the General Endowment Fund. The phrase "in such circumstances" as stated in s. 89(1) where a Muslim dies must be the circumstances where the Muslim dies intestate and/or without leaving behind any male descendants under which pursuant to the provisions of the Muslim law, his property or part thereof under his estate would vest in or become payable to Baitulmal. If the circumstances do not convey any vesting or payment to Baitulmal, s. 89(1) certainly would not be applicable. Since Muslim law was applicable to the estate of "Tam" if he/she was a Muslim coupled with the fact that he/she had presumably no male descendant, there would be vesting of part of his/her land under his/her estate to Baitulmal. Pursuant to s. 89(1) of the 1959 Enactment and the subsequent Enactments that replaced the 1959 Enactment, the Baitulmal's portion of the land shall vest in the plaintiff to form part of the General Endowment Fund. There is no question that the land would be crown land. I am of the view that for unadministered estate where it involved the vesting in or payment to Baitulmal, the plaintiff will have *locus standi* and jurisdiction pursuant to s. 89(1) of the 1959 Enactment.

Second Issue - Whether "Tam" Was A Muslim And Whether "Tam" And "Tan Binti Mat Assan" Were The Same Person

[16] The plaintiff's claim of that portion of the said land to be Baitulmal land is premised on the estate of "Tam @ Tan binti Mat Assan" which is vehemently challenged by the second defendant contending that there is no estate for anyone known as "Tam @ Tan binti Mat Assan". This is the main thrust of the defence's contention which goes to the root of the plaintiff's claim in that if "Tam" who was the registered proprietor

of the said land is not "Tam binti Mat Assan", there is then no such estate known as "Tam @ Tan binti Mat Assan" to confer right and interest onto the plaintiff *vide* Baitulmal. It follows that plaintiff's claim of such estate in relation to "Tam's" land which is the subject matter of the claim must fail. Therefore, the burden is on the plaintiff to prove that "Tam" and "Tan binti Mat Assan" upon such challenge were the one and same person to constitute the existence of such an estate; s. 101 of the Evidence Act 1950; *Tenaga Nasional Berhad (Formerly Lembaga Letrik Negara Tanah Melayu) v. Perwaja Steel Sdn Bhd (Formerly Perwaja Terengganu Sdn Bhd)* [1995] 4 CLJ 670; [1995] 4 MLJ 673, in the first place, whether "Tam" is a Muslim is a pertinent question for which plaintiff must prove. This is because even plaintiff's witnesses had candidly agreed that from the name of "Tam" alone as appeared in the land register, it is not known whether "Tam" was or was not a Muslim; see the cross-examination of SP2, SP4 and SP6. I must also add that there is even no evidence to prove whether "Tam" was a male or female person. From the evaluation of the evidence adduced as a whole, I must agree with the defendant's submission that there is no evidence at all to prove that "Tam", the owner of the said land was a Muslim.

[17] In an attempt to prove that "Tam" has the nexus with "Tan binti Mat Assan" and hence a Muslim too, plaintiff introduced a statutory declaration (ID17) allegedly affirmed by one Ishak bin Awang and Bakar bin Hamzah who had as evidenced since deceased. Since the declarants had passed away, plaintiff submitted that this statutory declaration can be admitted as exhibit pursuant to s. 73A of the Evidence Act 1950. Defence objected to such document being accepted as exhibit on ground that the pre-condition to s. 73A, ie, s. 73A(1)(a)(i) that both the declarants had personal knowledge of the matter dealt with by the statement, was not fulfilled by the plaintiff. Before embarking onto the admissibility of ID17, it is incumbent upon the plaintiff to prove in the first place that both the declarants had signed the said declaration. Since both of them had died, the person who attested their signatures could have been called to testify or anyone else called to verify that those signatures on ID17 were the signatures of the two declarants. Plaintiff did not do so. It appears that the plaintiff is attempting to urge this court to assume the signatures to be the respective signatures of the said Ishak and Bakar merely because the respective signatures appeared at their respective names without proving who they were and what they were. Plainly, this court cannot do so. In *Yee Ah Fern v. Alliance Bank Malaysia Bhd* [2010] 5 CLJ 475; [2010] 7 MLJ 547, 556, His Lordship Mohd Hishamudin J (now JCA), had made it very clear that if the defendant wishes the court to believe that the signature on the letter is that of the plaintiff, the defendant must come up with the

A evidence and His Lordship held that the court cannot make the inference that the signature on the letter must be that of the plaintiff just because the plaintiff's name is written just below the alleged signature. The same shall apply in the instant case where this court cannot make such inference that the signatures must be that of Ishak bin Awang and Bakar
B bin Hamzah.

[18] The plaintiff is also seeking this court to presume that the contents of this declaration are true as stated or that Ishak and Bakar had personal knowledge of the matters as stated therein when plaintiff had adduced no evidence to prove its contents or their personal
C knowledge relating to it. It is a case of presumption upon presumption that plaintiff is seeking which I am not prepared to accede in the absence of any other evidence or any good valid reason.

[19] In plaintiff's further submission, this court is further urged to
D invoke s. 90 of the Evidence Act to presume the signatures in this document of 20 years old are in the persons' handwriting and duly attested. However, there is no evidence of its proper custody being adduced. SP4, Ketua Penolong Pengarah Jabatan Tanah & Galian who tendered ID17 in court said that he did not know how ID17 was
E submitted. His uncertainty itself had created doubt as to when and how this document came into being and cannot be said to have satisfied the requirement for the presumption to be invoked. I do not agree that plaintiff can be allowed to rely on presumption particularly on substantive matter which is strenuously challenged by the defence. The applicability of s. 90 of the Evidence Act 1950 relating to document of 20 years old
F or more is that when such document is produced from proper custody and is on its face free from suspicion, the court may presume that it has been signed or written by the person whose signature appears or in which handwriting it purports to be and that it has been fully attested and executed. It does not apply in cases where there is doubt which
G has not been erased. More pertinently, such presumption should not be invoked when the prejudicial effect outweighs its probative value. However even if s. 90 of the Evidence Act 1950 is applicable, this presumption relates to the execution of the document in relation to the signature, attestation, etc, as to its genuineness but not to the truth of
H its contents for which the court will not presume the correctness of any statement in the document: per His Lordship Sharma J in *Commissioners of the Municipality of Malacca v. Sinniah* [1970] 1 LNS 22; [1974] 1 MLJ 77, 79. In other words, the correctness and the truth of ID17 cannot be presumed under s. 90 of the Evidence Act 1950 and it is
I still incumbent upon the plaintiff to prove its contents which I find that the plaintiff as stated above had eminently failed to do. There is,

moreover, also no explanation why the official who attested the two signatures of Ishak and Bakar was not called to testify so as to verify and clear all doubts. A

[20] In the circumstances particularly without the truth or the correctness of the contents of ID17 having been proved, the fact that they have both since deceased by itself does not make this document admissible under s. 73A of the Evidence Act 1950 since the precondition has not been fulfilled. Without the signatures having been proved, it cannot be said that the signatories had ascribed to the fact that they had personal knowledge of the matters declared and would be able to vouch for its truth. I therefore rule that ID17 is inadmissible and that no weight is to be given to its contents. Since ID17 had not been properly proved and admitted as exhibit, it must in the ultimate analysis be discounted and references to it as well as oral testimony adduced in relation thereto shall be disregarded; see *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 LNS 92; [1977] 1 MLJ 180, 183. B C D

[21] On the assumption that this court has erred and ought to admit ID17 and consider its contents, I shall turn to look at the contents of ID17. Ostensibly, it refers to "kematian dan pengebumian" "Etam bt Mat Assan" but does not refer to "Tam" and/or "Tan binti Mat Assan" nor did it say that "Etam bt Mat Assan" was known as "Tam" and/or "Tan binti Mat Assan". Thus, the death and burial of Etam bt Mat Assan on the face of this statutory declaration even if it is admitted as exhibit does not show any nexus nor prove that "Tam" and "Tan binti Mat Assan" were the same person. If the plaintiff wants to prove that Etam bt Mat Assan was indeed referring to "Tam" and/or "Tan binti Mat Assan", the statutory declaration must clearly say so but it did not. There cannot be another assumption. Hence I find that ID17 does not prove the fact the "Tam" was a Muslim or "Tam" was "Etam binti Mat Assan" when it does not expressly say so in the said statutory declaration. E F G

[22] The titles of the said land, ie, exh. P12 (bundle C p. 8) and P13 (bundle B p. 10) show that the registered proprietor of the said land Lot 563 is "Tam". Exhibit D4 (bundle E pp. 3 - 5) shows 1/2 share of the land Lot 562 was registered in the name of "Tan binti Mat Assan" with the other 1/2 share owned by Wan bt Sahin. There is no evidence from the titles of both lands to prove that "Tam" and "Tan binti Mat Assan" were the one and same person nor any nexus except the fact that both lands Lot 562 and 563 are neighbouring lands. There is no doubt that the name of "Tan bt Mat Assan" had never appeared in the title of Lot 563 nor the name of "Tam" in Lot 562. SP4, Ketua Penolong Pengarah Jabatan Tanah & Galian speaking of the small estate H I

distribution of the estate of Tam @ Tan bt Mat Assan stated that there is no record to show that "Tam" and "Tan binti Mat Assan" were the same person. Looking at the title of Lot 562 (E pp. 3 - 5) and the small estate distribution order (B pp. 5 - 6), SP4 endorsed that there is no proof that "Tan" had the other name as "Tam". SP5, in this respect, also agreed that in Lot 562, there was no name of "Tam". SP5 is a potential beneficiary and had made the statutory declaration P19 claiming that Etam bt Mat Assan and Tam @ Tan bt Mat Assan were the same person and was her grandmother. There is no dispute that "Tan" was her grandmother but there is no proof that "Tam" was "Tan". Even ID17 which she relied on as the basis of her declaration did not say that "Etam" was "Tam". It is thus a bare assertion without proof. One glaring doubt that lingers throughout the trial is that if "Tan binti Mat Assan" is the same person as "Tam", why was the name "Tan binti Mat Assan" not so registered in the said titles; instead, only a single word of "Tam" was registered and not even "Tam binti Mat Assan" which could probably be argued to be a spelling error when compared to "Tan binti Mat Assan". Undoubtedly, it is not the case. In order to claim that "Tam" and "Tan binti Mat Assan" were the same person, there must be basis to prove so. This court cannot accept a bare claim without any form of proof. Otherwise, it would create a dangerous proposition that any party could claim any neighbouring land of another by simply alleging or to the extent of swearing a declaration that other was the same person with another in order to claim what is not rightfully his/hers.

[23] With all the doubts and infirmities as deliberated above, I must hold on a balance of probabilities and upon a clear finding of facts that the plaintiff had failed to prove that "Tam", the registered proprietor of the said land Lot 563 had any nexus with "Tan binti Mat Assan" or "Etam bt Mat Assan" nor had the plaintiff proved that "Tam" and "Tan binti Mat Assan" were the one and same person. With this finding, it follows that there could not have been proved an estate of "Tam @ Tan binti Mat Assan" which gave rise to the Sijil Faraid to confer upon the plaintiff the claim of 39/48 shares in Baitulmal of the said land Lot 563 belonging to the said "Tam". Plaintiff's claim must therefore fail on this ground alone.

Third Issue - Sijil Faraid (P14)

[24] Defence of second defendant had not challenged the admissibility of this Sijil Faraid but the contents therein, However, plaintiff had led no evidence to prove its contents. Plaintiff had referred to s. 74(a)(ii) of the Evidence Act to contend that Sijil Faraid was a public document as "documents forming the acts or records of the acts of official bodies and

tribunals". There is no quibble about that as its admissibility was not challenged. As to the contents, plaintiff is relying on the presumption under s. 114(e) of the Evidence Act and the case of *Sharma Kumari Oam Parkash v. PP* [2000] 1 LNS 123; [2000] 6 MLJ 847 which held *inter alia* that "Section 114(e) ... allows a court to presume that judicial acts have been regularly performed". However when the contents of a public document are challenged, the party seeking to assert the facts stated therein must take steps to prove them to enable the court to decide whether due weight ought to be accorded to the contents. In *Loo Keck Leong v. PP* [1992] 3 CLJ 1332; [1992] 1 CLJ (Rep) 195 at p. 199; [1992] 2 MLJ 177 at p. 182 SC, cited by the defence, Peh Swee Chin SCJ stressed that this presumption is applicable in the absence of objection but the court will not be so presumed in view of the objection raised by the defence to the elementary nature and quality of exhibit; I agree with such proposition. The plaintiff cannot abate its burden to prove when there is such a challenge. Basically, without embarking on any religious issues which are out of the jurisdiction of this court, plaintiff could have easily called the relevant authority to prove how they obtained the 39/48 shares of the land upon the death of "Tam" assuming that she was a Muslim having passed away without leaving any male descendant. If there is such a schedule or table of calculation or an applicable formula of calculating the portion or share of land under the estate to be passed on to Baitulmal, I am of the view that it suffices for the relevant witness from the issuing authority to show that manner of calculation and the result thereof which became the basis of the claim towards Baitulmal. Plaintiff has not done the minimum to satisfy their burden and onus of proof; see s. 101, 102 and 103 of the Evidence Act 1950. Consequently, it gives rise to a doubt whether 39/48 shares of the said land was a proper and accurate calculation of the claim from Tam's estate towards the credit of Baitulmal as stated in P14.

Fourth Issue - *Bona Fide* Purchaser For Value Without Notice

[25] Second defendant had bought the said land in dispute with valuable consideration of RM60,000. The vendor of the said land was one Ali bin Hussain who had since passed away. Plaintiff had initially sued the estate of Ali bin Hussain as the first defendant but had on 24 August 2011 withdrawn the case against the first defendant. As this court has found the second issue above that the plaintiff had failed to prove such an estate known as "Tam @ Tan binti Mat Assan", there would be no property from this alleged estate of "Tam @ Tan binti Mat Assan" to be vested in Baitulmal and in the plaintiff for the plaintiff to invoke the provision of s. 4(2)(e) of the National Land Code over the provisions of s. 340(1) and (3) of the same Code. In other words, s. 340(1) and

(3) would be applicable when s. 4(2) of the Code is not or cannot be invoked. *Prima facie*, second defendant who purchased the said land with good valuable consideration without notice would have his interest protected. To challenge the second defendant's title the plaintiff must first challenge the title of Ali bin Hussain in order to break the shield of indefeasibility under s. 340(1) which protects the registered proprietor (*Subramaniam NS Dhurai v. Sandrakasan Retnasamy & Ors* [2005] 3 CLJ 539 CA; *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526; [2007] 5 MLJ 136). Assuming that this court agrees with the plaintiff's evidence that the memorandum of transfer from Ali bin Hussain ultimately to the second defendant was invalid because when Ali's alleged thumb print on the memorandum of transfer was allegedly attested, the said Ali bin Hussain had in fact passed away which put doubt to the propriety of the said transfer from Ali bin Hussain ultimately to the second defendant. Hence if the transfer was ineffective on account of the death of Ali, this means that the title should remain in the name of Ali bin Hussain and it falls onto the estate upon Ali's death. However, with the suit against the first defendant having been withdrawn, the plaintiff is not seeking any order against the estate of Ali bin Hussain and consequently, this court will not and cannot make any order against the estate of Ali bin Hussain who shall remain as the registered proprietor and protected under the indefeasibility of title pursuant to s. 340(1) of the NLC 1965. In any event, plaintiff is in no capacity to represent the estate of Ali bin Hussain. Bereft of any other evidence, the second defendant, being the registered proprietor of the said land having purchased it for value without notice is thus a *bona fide* purchaser and his title is indefeasible under s. 340(1) of the NLC 1965. In the circumstances, plaintiff will have no cause of action against the second defendant.

Other Matters Raised

[26] Referring to exh. P15 (bundle B pp. 5 - 6) which was the letters of administration issued pursuant to the Small Estates Distribution Act 1955, plaintiff contended that the second defendant could have challenged P15 as to the administration of the said land. Second defendant however contended that P15 was obtained in 1995 whereas the second defendant only became the registered owner of the said land in 1997; it was further contended that 'notice to the whole world' (*Pang Cheng Lim v. Bong Kim Teck & Ors* [1997] 4 CLJ 414 FC; *Sharma Kumari Oam Parkash v. PP* [2000] 1 LNS 123; [2000] 6 MLJ 847) given in 1995 was irrelevant to the second defendant since in 1995, second defendant had no interest in the said land. I must agree with the second defendant's submission in this respect.

[27] Turning to exh. P16 (bundle C pp. 1 - 4) which this court marked as exhibit but subject to submission as to its contents, it involved the statement made by one Maimunah bt Ahmad who claimed to be the "cucu saudara" to "Tam @ Tan bt Mat Assan" and who was not called to testify on account of her old age and illness; plaintiff urged this court to accept her statement given in her application for the administration of the estate of "Tan bt Mat Assan @ Tam" pursuant to s. 73A Evidence Act notwithstanding that she was not called as a witness. Second defendant in submission contended that under s. 73A(3) of the Evidence Act, any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish, is inadmissible. The fact which the plaintiff sought to establish is that "Tam @ Tan bt Mat Assan" was the said Maimunah bt Ahmad's "tok saudara" who died in 1940 and that the said land belonging to "Tam" was to be administered. This is certainly the fact in dispute between the parties herein this case where second defendant had strongly challenged that "Tam" and "Tan bt Mat Assan" were the same person. To admit such fact without it having been proved and without any opportunity for the defence to cross-examine the said Maimunah bt Ahmad would be highly prejudicial to the second defendant. This is especially so when there is no evidence to prove the nexus between "Tam" and "Tan bt Mat Assan" as found by this court above. When the prejudicial effect of such disputed fact stated in the statement outweighs its probative value of the facts stated therein, the plaintiff cannot be allowed to rely on s. 73A(2)(a) of the Evidence Act 1950 to dispense with its burden and onus of proof. I therefore hold the view that Maimunah's alleged statement of fact in P16 is not to be accorded with any weight under s. 73A(3) of the Evidence Act 1950.

[28] The underlying principle of invoking s. 114(g) of the Evidence Act 1950 against a party for not calling an important and material witness or the non-production of an important and material document is that the party who should call the witness or produce the document is withholding or suppressing the evidence and not merely on account of a failure to obtain evidence; see Sarkar's *Law of Evidence* 15th edn. 1999, p. 1678. This provision was urged to be invoked by the plaintiff against the second defendant for not calling the lawyer M Nakaretnam who purportedly prepared the transfer of the said land from Ali bin Hussain to the second defendant and who allegedly attested the thumb print of Ali bin Hussain on the memorandum of transfer from Ali bin Hussein to the second defendant which led to the second defendant being

registered as the proprietor of the said land. Defence had in fact applied for subpoena against the said M Nakaretnam to testify on the trial date and it was duly served but he had failed to turn up on both the dates for this trial. I am of the view that the issuance of the subpoena against the said M Nakaretnam is indicative that the second defendant did not intend to withhold or suppress evidence of the witness. It is unfortunate that the witness elected not to attend court for whatever reason best known to him but his absence should not be attributed to the second defendant nor be so construed as suppressing the witness' evidence. I do not find it appropriate to invoke an adverse inference against the second defendant in the circumstances.

Conclusion

[29] Having considered all the evidence before this court and all submissions of both parties herein, for the foregoing deliberated reasons, I hold that the plaintiff had failed to prove its case on a balance of probabilities and I therefore dismiss the plaintiff's claim with costs of RM10,000.